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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 JIM HENSLEY,

11 Plaintiff,

12 v.

13 CITY OF PORT HUENEME, a
14 California governmental entity;
15 CARMEN NICHOLS, an individual,
16 and DOES 1 through 7, inclusive,

17 Defendants.
18

Case No. 2:17-cv-08422-AB (Ex)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

19 Before the Court is Defendants' Motion for Summary Judgment. (Dkt. No. 72.)
20 Plaintiff Jim Hensley ("Hensley") opposed the motion and Defendants replied. (Dkt.
21 Nos. 86, 88.) The Court heard oral argument on May 3, 2019 and took the matter
22 under submission. For the following reasons, Defendants' motion is **GRANTED**.

23 **I. BACKGROUND**

24 **a. Factual Background**

25 Hensley was elected to the City Council of the City of Port Hueneme on
26 November 4, 2014. (Dkt. No. 86.) Nichols served as Deputy City Manager of the
27 City of Port Hueneme. *Id.* During a portion of her time at City Council, Nichols
28 heard comments from Hensley, including remarks about her appearance and her

1 similarity to Hensley's wife. Hensley also made comments about Nichols being a
2 "Latina". At a City Council meeting on July 7, 2017, Nichols gave a presentation
3 regarding compensation of the City's employees. Dkt. No. 1 ("Compl."). In response
4 to Nichols's report, Plaintiff stated that ". . . there was kind of a sneaking back door
5 raise for some other employees that I feel very uncomfortable about. I think it's
6 giving out kind of false information." *Id.* ¶ 39. Nichols rejected Plaintiff's
7 suggestion that there were "back door raises". *Id.* ¶ 40. Upon hearing the exchange,
8 Defendant Tom Figg, Mayor of the City of Port Hueneme, ended the conversation and
9 replied, "I don't think it's appropriate to make those kinds of comments without
10 having the facts". *Id.* ¶ 42. Figg apologized to Nichols for the comments. *Id.* ¶ 43.

11 On August 2, 2017, Defendant Nichols submitted her resignation from her post
12 as City Manager in a confidential memorandum. *Id.* ¶ 44. In a separate confidential
13 memorandum, Nichols stated that Hensley made public sexist comments, false
14 remarks, and demeaning statements during council meetings. *Id.* Nichols also
15 expressed concerns that Hensley would attempt to sabotage her ability to gain future
16 employment. *Id.*

17 The City Council held another meeting on August 7, 2017—five days after
18 Nichols submitted her resignation. *Id.* ¶ 45. During the meeting, Defendant Figg read
19 from a written statement, noting that "[a]t a [sic] last regular meeting, Mayor Pro-Tem
20 Jim Hensley made some unfortunate inflammatory remarks directed towards City
21 Staff. That exchange followed one week later with the resignation of Ms. Carmen
22 Nichols, Deputy City manager, a highly valued member of the City's organization."
23 *Id.* ¶ 52. Figg continued to state that Hensley made "mean-spirited and reckless
24 remarks" based on hearsay and opinions. *Id.* Figg, on his own accord, introduced a
25 resolution reprimanding Hensley for the "unwarranted, unfounded, unsubstantiated,
26 unprofessional and not worth [sic] of an elected official of the [City]" comments
27 directed towards Nichols. *Id.* ¶ 56. The City Council voted to pass the resolution,
28 which also had the effect of removing Hensley from all of his Council appointed

1 committees, commissions, and organizations. *Id.* Hensley was compensated for his
2 appearance at meetings he attended through his appointment. *Id.* The resolution
3 further notes that Plaintiff's actions "are below the minimal standard of behavior for a
4 member of the City Council of the City of Port Hueneme." *Id.* Plaintiff was not given
5 an opportunity to respond to Figg's proposed resolution because of possible conflicts
6 of interest. *Id.* ¶ 54.

7 **b. The Current Action**

8 Plaintiff brings this action pursuant to 42 U.S.C. § 1983 against the City of Port
9 Hueneme, Defendant Nichols, and Defendant Figg, alleging that his censure at the
10 City Council meeting violates the First Amendment of the United States Constitution.
11 Further, Plaintiff alleges Defendants employed viewpoint discrimination against him
12 for his July 7, 2017 speech adopting Figg's proposed resolution.

13 Defendants move for summary judgment asserting that Plaintiff has not
14 established facts that support his claim under Section 1983. Further, Defendants
15 assert a qualified immunity defense on behalf of Defendant Figg.

16 **II. LEGAL STANDARD**

17 Summary judgment shall be granted "if the movant shows that there is no
18 genuine dispute as to any material fact and the movant is entitled to judgment as a
19 matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the
20 outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F. 3d
21 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,
22 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A dispute is genuine "if the evidence is such
23 that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477
24 U.S. at 248, 106 S.Ct. 2505.

25 The moving party bears the initial burden of establishing that there is no genuine
26 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party
27 moving for summary judgment may meet this initial burden by identifying the
28 portions of the pleadings, depositions, answers to interrogatories, admissions, or

1 affidavits that demonstrate the absence of a triable issue of material fact. *Id.* If the
2 moving party meets the initial burden, the burden then shifts to the non-moving party
3 to go beyond the pleadings and designate specific materials in the record to show that
4 there is a genuinely disputed fact. Fed. R. Civ. P. 56(c); *Celotex Corp.*, 477 U.S. at
5 324. The court must draw all reasonable inferences in favor of the party against
6 whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio*
7 *Corp.*, 475 U.S. 574, 587 (1986). However, the mere suggestion that there are facts in
8 controversy or the inclusion of conclusory or speculative testimony in affidavits and
9 moving papers is not sufficient to defeat summary judgment.

10 **III. DISCUSSION**

11 Plaintiff raises three arguments to support his claim that Defendants violated his
12 First Amendment rights. First, Plaintiff asserts that his right to free speech was
13 violated when he was censured from debating the resolution raised by the City against
14 him on August 7, 2017. Next, Plaintiff states that the City violated clearly established
15 constitutional rights in passing the resolution. Finally, Plaintiff claims Defendants
16 Nichols and Figg, in their individual capacity, violated Plaintiff's free speech rights.
17 The Court addresses Plaintiff's claim below.

18 **a. Defendants' Have Satisfied Their Initial Summary Judgment** 19 **Burden**

20 As a threshold matter, Plaintiff contends that Defendants have not met their
21 initial summary judgment burden by failing to demonstrate there is an absence of a
22 genuine issue of material fact. After review of Plaintiff's pleadings and the records of
23 City Council meetings, the Court determines there are no genuine issues of material
24 fact. Plaintiff asserts that his First Amendment rights were violated because: (1) he
25 was denied the right to speak on his behalf regarding the August 7, 2017 resolution;
26 and (2) the City of Port Hueneme violated his clearly established First Amendment
27 rights. The Court finds no material dispute as to either issue. Plaintiff pleads the
28 following. Plaintiff was a councilman for the City of Port Hueneme. During a City

1 Council meeting, Plaintiff raised a line of inquiry against Defendant Nichols,
 2 purporting that back-door raises may have occurred during Nichol's tenure.
 3 Defendant Figg determined that Plaintiff's suggestion was improper, ceased the
 4 conversation, and apologized to the City Council for Plaintiff's remarks. Shortly
 5 thereafter, Nichols resigned from her post as City Manager, citing Plaintiff's
 6 inappropriate remarks and behavior during their numerous interactions with one
 7 another. At the next council meeting, Defendant Figg raised a resolution stripping
 8 Plaintiff of many of his councilman rights. Plaintiff was censured from raising any
 9 objection. Plaintiff's sole cause of action is based on these facts, of which there is no
 10 material dispute.

11 Plaintiff has failed to provide any pleadings that raise a dispute as to whether
 12 Defendant Nichols was a co-conspirator¹ in the resolution or that Defendant Figg
 13 violated a clearly established law in raising a resolution for City Council vote.²
 14 Accordingly, the Court turns to Plaintiff's substantive arguments against the City of
 15 Port Hueneme in support of his First Amendment claim.

16 **b. Plaintiff's First Amendment Claim**

17 Plaintiff first argues that his First Amendment rights were violated by the City
 18 Council's adoption of the August 2017 resolution which reprimanded his prior speech.
 19 To recover under § 1983 for a retaliation of speech, a plaintiff must prove (1) he
 20 engaged in constitutionally protected activity; (2) as a result, he was subjected to
 21 adverse action by the defendant that would chill a person of ordinary firmness from
 22 continuing to engage in the protected activity; and (3) there was a substantial causal

23 ¹ Plaintiff does not raise any facts that support the speculative allegations that
 24 Defendant Nichols coordinated with City Council members to pass a resolution
 25 regarding Plaintiff. Moreover, Plaintiff's Complaint contradicts any such notion in
 26 alleging that Defendant Figg stated during the August 7, 2017 meeting that "[t]his is
 my initiative and mine alone." Compl. ¶ 20.

27 ² Through a survey of First Amendment retaliation case law as discussed below, it is
 28 apparent there is no clearly established law under the First Amendment which
 prohibits City Council members from raising resolutions against antagonistic and
 disruptive elected public officials.

1 relationship between the constitutionally protected activity and the adverse action.³
2 *Blair v. Bethel School Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). “The inquiry into the
3 protected status of speech is one of law, not fact.” *Connick v. Myers*, 461 U.S. 138,
4 148 n. 7, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). “The prototypical plaintiff in
5 [retaliation] cases is a government worker who loses his job as a result of some public
6 communication critical of the government entity for whom he works.” *Blair*, 608
7 F.3d at 544 (citing *Pickering v. Bd. of Educ. Of Township High Sch. Dist.*, 391 U.S.
8 563, 564, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)).

9 Plaintiff contends that *Pickering* and its progeny do not apply to speech by a
10 city council member. *See e.g., Phelan v. Laramie County Cmty. College Bd. of*
11 *Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000). However, Plaintiff has not persuaded
12 the Court that his position as a city council member is substantially different from the
13 publicly elected plaintiff in *Blair*. In *Blair*, a publicly elected former vice president of
14 a public school board raised a First Amendment retaliation claim against the district,
15 the district’s superintendent, the board’s president, and others, alleging he was
16 removed as the board’s vice president in retaliation to negative comments about the
17 superintendent. The Ninth Circuit determined that while plaintiff’s speech was clearly
18 protected by the Constitution, and there was a causal link between plaintiff’s speech
19 and his removal as vice president, plaintiff had failed to identify any “adverse action”
20 that would chill speech. *Blair*, 608 F.3d. at 543. The Court determined that before
21 evaluating whether plaintiff’s removal from the board “would chill a person of
22 ordinary firmness”, it must examine the nature of plaintiff’s adverse action. *Id.*
23 Specifically, the Court noted that “[w]hat’s different here is the ‘adverse action’

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25 ³ Plaintiff also seeks to raise arguments under *Norse v. City of Santa Cruz*, 629 F.3d
26 966 (9th Cir. 2010). *Norse* does not apply here; Plaintiff was not acting as a public
27 citizen during the July 7, 2017 meeting. Further, Plaintiff’s speech was given in his
28 official capacity as an elected official. The Court need not dive into a detailed
analysis of *Norse* and similar cases, but notes that Plaintiff’s speech was, in fact,
disruptive, and Defendant Figg not only interjected, but apologized to the entire City
Council for Plaintiff’s conduct.

[plaintiff] is challenging was taken by his peers in the political arena.” *Id.* The *Blair* court took umbrage with plaintiff’s position because to adopt it “is to hold that the First Amendment prohibits elected officials from voting against candidates whose speech or views they don’t embrace.” *Id.* at 544.

In addition, the *Blair* court determined that plaintiff’s speech was not the only speech that afforded protection. The court noted that “the vote to remove Blair as Board vice president communicated to Blair and to the public that the Board majority viewed Seigel’s performance very differently from the way Blair saw it, and wanted to distance itself from Blair’s criticism of the superintendent.” *Id.* at 545.

Here, Plaintiff uttered statements during a City Council meeting and Defendant Figg determined those statements were “mean-spirited and reckless remarks” which “undermine[d] the very objectives” Plaintiff sought to achieve for the City of Port Hueneme. Compl. ¶ 52. Defendant Figg then raised the resolution stripping Plaintiff of his basic duties but did not remove him from the City Council. The resolution passed by vote of City Council, and while the record before the Court does not detail the exact scope and extent of Plaintiff’s remarks, the evidence shows that the vote was not merely a callous and baseless retaliation. “Disagreement is endemic to politics, and naturally plays out in how votes are cast.” *Blair*, 608 F.3d at 546. Plaintiff, through his political machinations, was outvoted and demoted by his fellow council members who sought to distance themselves from Plaintiff’s position. This does not appear to be a situation that calls for the constitutional safeguards of the First Amendment.⁴

⁴ That Plaintiff suffered a financial consequence as a result of his demotion does not alter the Court’s reasoning. Plaintiff is still fully entitled to participate in City Council meetings and express his opinions. Merely because his actions have had negative electoral consequences does not implicate the protections of the First Amendment. *See e.g., Westfall v. City of Crescent City*, 2011 WL 2110306 (N.D. Cal. 2011) (“The [city censure] also removes Plaintiff as a representative or alternate on eight different committees. Because Plaintiff was not an elected official to these committees as a city representative and/or alternate, ‘the council was within its discretion to remove her from that position’ and doing so did not limit Plaintiff’s freedom of speech.”).

1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendants' Motion for Summary Judgment is
3 **GRANTED.** Defendants shall submit a Proposed Judgment within 14 days. All dates
4 are vacated.

5
6 **IT IS SO ORDERED.**

7
8 Dated: May 7, 2019

A handwritten signature in black ink, appearing to read "André Birotte Jr.", with a long horizontal flourish extending to the right.

10 HONORABLE ANDRÉ BIROTTE JR.
11 UNITED STATES DISTRICT COURT JUDGE